

COASTAL STATES ENERGY CO.

IBLA 83-274

Decided May 31, 1984

Appeal from a decision of the Utah State Office, Bureau of Land Management, imposing readjusted terms and conditions on coal lease. UT-020305.

Affirmed in part; set aside in part and remanded.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1976), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is filed prior to the end of the 20-year primary term of the lease.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land. However, where the requirements of a coal lease are not in conformance with a statute or regulation or the proper administration of the land, or are in apparent internal conflict or not clear as to their application to existing mining operations, the BLM decision will be set aside to that extent and remanded for amendment.

3. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment -- Coal Leases and Permits: Royalties

At the time of readjustment of the terms of a coal lease, BLM may, consistent with the policy of the Minerals Management Service, set the royalty rate at 8 percent for underground operations and refuse to consider a reduction of the rate to 5 percent, under the discretionary authority embodied in 43 CFR 3473.3-2(a)(3).

APPEARANCES: Eugene O. Rooke, Esq., and Brian E. McGee, Esq., Houston, Texas, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Coastal States Energy Company has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated November 10, 1982, imposing certain readjusted terms and conditions on appellant's coal lease, UT-020305.

Effective March 1, 1962, BLM issued coal lease UT-020305 to Emmett K. Olson for 1,439.40 acres of land situated in Carbon and Emery counties, Utah, within the Manti-LaSal National Forest, pursuant to section 1 of the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1982). By several mesne assignments the record title interest in coal lease UT-020305 was transferred to appellant. 1/ By notice dated October 6, 1981, appellant's predecessor-in-interest was informed by BLM that the terms and conditions of coal lease UT-020305 "will be readjusted under the provisions of 43 CFR [Subpart] 3451." BLM stated that a notice containing the readjusted terms and conditions would be forwarded "no later than two years from the date of this notice," and that readjustment would become "effective 60 days after receipt of that notice." By notice dated February 22, 1982, prior to the 20-year anniversary date of the lease, BLM informed appellant's predecessor-in-interest of the proposed readjustment of coal lease UT-020305. BLM stated that: "As provided in Section 3(d) of the lease and the regulations under 43 CFR 3451.2, enclosed are the terms and conditions of readjusted coal lease Utah 020305, effective May 1, 1982." The notice further provided for a 60-day period from receipt of the notice for the filing of objections to the proposed readjustment. Appellant's predecessor-in-interest subsequently filed timely objections to the proposed readjustment. In its November 1982 decision, BLM readjusted coal lease UT-020305 effective May 1, 1982, 2/ and in the process overruled various objections of appellant's predecessor-in-interest and sustained others.

In its statement of reasons for appeal, appellant contends that BLM is barred "by statute" from readjusting the terms and conditions of coal lease UT-020305 because it failed to issue a final decision setting forth such terms and conditions prior to the expiration of the 20-year period from issuance of the lease, i.e., March 1, 1982. Appellant argues that the October 1981 notice

1/ This appeal was originally filed by Frank Armstrong and Zion's First National Bank, executors of the estate of Malcolm N. McKinnon. However, by order dated Feb. 10, 1983, the Board temporarily returned the case file to BLM in order to permit approval of assignment of the lease to appellant. BLM subsequently approved the assignment effective Mar. 1, 1983. By order dated Mar. 17, 1983, the Board granted a request to substitute appellant as the party-appellant.

2/ We presume that BLM chose May 1, 1982, in accordance with the 60-day period set forth in 43 CFR 3451.2(c). See Gulf Oil Corp., infra at 334.

of intent to readjust the terms and conditions of the lease and the February 1982 notice of proposed readjustment do not satisfy the statutory requirement. Appellant also argues that the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201-209 (1982), and its implementing regulations do not apply to pre-FCLAA leases even upon readjustment, and that these statutory provisions cannot be used to abrogate appellant's existing contractual rights. Finally, appellant contends that specific readjusted terms, conditions, and special stipulations are a breach of its contractual rights, factually unsupported, arbitrary and capricious or constitute an abuse of discretion.

In an answer to appellant's statement of reasons, BLM argues that the present appeal raises the "same" issues previously considered by the Board in Coastal States Energy Co., 70 IBLA 386 (1983), appeal pending, Coastal States Energy Co. v. Watt, Civ. No. C 83-0730 J (C.D. Utah filed June 3, 1983), and requests dismissal of the appeal. In a response to BLM's answer, appellant asserts that Coastal States is "not determinative" of the issues presented in the present appeal. Many of the issues raised in the present appeal were addressed in Coastal States Energy Co., supra; however, certain issues were not addressed. Therefore, the motion to dismiss by BLM is denied.

[1] In Coastal States Energy Co., supra, we addressed the central issues raised by appellant concerning the authority of BLM to readjust pre-FCLAA coal leases and the applicability of FCLAA and its implementing regulations. We concluded that where notice of intent to readjust the terms and conditions of a coal lease is given to the lessee prior to the expiration of the 20-year primary term of the lease, the statutory requirement for readjustment is satisfied and that BLM may thereafter set forth the specific terms and conditions. See Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 953 (10th Cir. 1982). In the present case, the notice of intent was issued October 6, 1981, well before the 20-year anniversary date of the lease, pursuant to 43 CFR 3451.1(c). Accordingly, BLM complied with the statutory requirement for timely readjustment. Moreover, in Coastal States Energy Co., supra, we concluded that FCLAA and its implementing regulations apply to coal leases issued prior to enactment of the statute, *i.e.*, August 4, 1976, when those leases are readjusted after that date. See Solicitor's Opinion, M-36939, 88 I.D. 1003 (1981). Accordingly, BLM may readjust coal leases in conformance with FCLAA and its implementing regulations even where it abrogates prior existing contractual rights. Moreover, BLM may readjust a coal lease in abrogation of existing contractual rights even where it is not pursuant to a statutory or regulatory mandate. As we said in Coastal States Energy Co., supra at 394:

Readjustment of lease terms and conditions, however, is not limited to specific legal requirements. As stated by the court in Rosebud Coal Sales Co., Inc. v. Andrus, supra at 951, "The scope or nature of the changes [readjustment] is not limited and there thus exists a very broad power to make changes considered to be in accordance with the proper administration of the lands."

A lessee simply has no vested right to the indefinite continuation of existing lease terms and conditions because to hold otherwise would negate the statutory reservation of the right to readjust. See 30 U.S.C. § 207 (1958); Gulf

Oil Co., *infra* at 330-01. Insofar as a coal lease readjustment is concerned, a lessee has only one existing right: the right to accept or reject the continuation of a coal lease beyond a 20-year period under such reasonable terms as the Secretary deems proper. These terms, themselves, necessarily define his rights beyond the first 20-years. There are in short no existing rights that could be abrogated by a proper coal lease readjustment though prior rights could be altered.

Appellant argues that readjustment of coal lease UT-020305 must conform to the provisions of sections 3(d) of its original lease, which reserved the right reasonably to readjust lease terms and conditions. Appellant contends that not only must readjustment be reasonable but, under the principle of *ejusdem generis*, readjustment is limited to "other terms and conditions" related to royalties. The principle of *ejusdem generis* provides that general words are not to be given their widest meaning where they follow words of specific meaning but are to be limited in meaning by the specific words. Black's Law Dictionary 608 (4th ed. 1968). Appellant, however, ignores the fact that, at the time of issuance of coal lease UT-020305, the applicable statute (30 U.S.C. § 207 (1958)) and regulation (43 CFR 193.16 (1962)) provided for the readjustment of any and all terms and conditions of coal leases. *See FMC Corp.*, 74 IBLA 389, 393 (1983). Readjustment of appellant's coal lease is governed by the provisions of FCLAA and its implementing regulations, and by administrative standards of review, *i.e.*, readjustment should not be arbitrary and capricious or constitute an abuse of discretion.

[2] We turn, therefore, to the specific provisions of the readjusted coal lease objected to by appellant. Appellant first objects to section 3 of the readjusted lease which requires diligent production of coal "in commercial quantities before June 1, 1986." This requirement was taken from the regulations in effect at the time of readjustment. *See* 43 CFR 3400.0-5(m)(2) (1981). Appellant argues that section 6 of FCLAA, 30 U.S.C. § 207 (1982), which requires production in commercial quantities "at the end of ten years," requires only that a lessee commence production prior to the end of the 10-year period, which begins on the date of readjustment and ends 10 years thereafter, not June 1, 1986. In Coastal States Energy Co., *supra*, we noted that after the BLM decision under appeal was issued, the regulations were changed and that 30 CFR 211.2(a)(14), promulgated effective August 30, 1982, provided the 10-year period for diligent development would run from the date of readjustment for pre-FCLAA leases. *See* 47 FR 33180-81 (July 30, 1982). The regulation codified at 43 CFR 3400.0-5(m)(2) (1981) was also deleted effective August 30, 1982. *See* 47 FR 33133 (July 30, 1982). In its November 1982 decision, BLM observed that the regulations had been changed and concluded that appellant would have the benefit of this regulatory change by virtue of section 1 of the readjusted lease, which provides in relevant part that: "This lease is also subject to all regulations of the Secretary of the Interior * * * which are now or hereafter in force." Appellant states that BLM is in the process of revising its coal lease form to delete the "hereafter in force" language. In any case, in Coastal States Energy Co., *supra* at 392, we set aside the BLM decision as to the diligence requirement and remanded the case to BLM so that the leases "may be conformed to the new regulation." We hereby set aside the November 1982 BLM decision and remand the present case for that same purpose. With respect to what is required under diligent development, we concluded in Coastal States that production, and not just the commencement of production, is required.

Appellant next objects to the \$60,000 (formerly \$5,000) bond required in section 4 of the readjusted lease, contending that BLM has not substantiated the formula for determining the bond amount, which is purportedly derived from guidelines of the Minerals Management Service (MMS). In its November 1982 decision, BLM confirms that the bond amount is set in accordance with MMS guidelines entitled "Guidelines for Bonding Requirements on Federal Coal Lease," dated April 23, 1980, which require a bond sufficient to cover 3 months of estimated production and 1-year rental. Neither the statute nor Departmental regulations provide a specific formula for computing the amount of a bond. However, 43 CFR 3400.0-5(s) provides that a "lease bond," required by 43 CFR 3474.1, shall mean

the bond or equivalent security given the Department to assure payment of all obligations under a lease, exploration license, or license to mine, and to assure that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining or exploration plan. [Emphasis added.]

Appellant has provided no evidence that the amount of the bond set in the present case was more than is required to accomplish these regulatory purposes. See Cambridge Mining Co., 74 IBLA 26 (1983). We conclude that BLM properly set the amount of the lease bond. Coastal States Energy Co., *supra*.

Appellant next objects to section 5 of the readjusted lease which set the annual rental for the lease at \$3 per acre and provided that rentals "may not be credited against royalties." In Coastal States, we concluded that the \$3 per acre annual rental is the minimum rental required by 43 CFR 3473.3-1(a) and that, therefore, BLM properly imposed that rental figure on pre-FCLAA leases upon readjustment, even though it represents an increase of 200 percent from the prior \$1 per acre rental figure. Similarly, 43 CFR 3473.3-1(c) specifically provides that: "On leases issued or readjusted after August 4, 1976, rental payments shall not be credited against royalties." ^{3/} Accordingly, we conclude that section 5 of the readjusted lease comports with the applicable regulations and was properly imposed. Mid-Continent Coal & Coke Co., 78 IBLA 178 (1984).

Appellant next objects to section 10 of the readjusted lease which provides that "if the Lessee has not yet submitted a mining plan, he must do so within three years after the effective date of this readjustment." Appellant asserts that the lease should be amended to recognize that two mining plans have already been approved. This is eminently a useless exercise in view of the fact that the 3-year requirement expressly applies only if no plan has been submitted. Moreover, as BLM explained in its November 1982 decision at page 4:

This section is still required though on the remote chance that the operations could terminate along with the mining plan. In

^{3/} This regulation is consonant with section 6 of FCLAA, *supra*, which in part deleted the prior statutory requirement to credit rentals against royalties. See 47 FR 33131 (July 30, 1982).

addition, mining plans approved relate to coal beds that are currently under production. For other mineable coal beds on these leases, new or revised mining plans will be required.

See also Blackhawk Coal Co., 68 IBLA 96, 100 (1982).

Appellant's next argument concerns section 11 of the readjusted lease which concerns logical mining units (LMU's). Appellant asserts that the section should be amended to conform to new regulations applicable to LMU's. These regulations were promulgated effective August 30, 1982. See 30 CFR 211.80 (47 FR 33193 (July 30, 1982)). In its November 1982 decision, at page 4, BLM admitted that the applicable regulations have been revised "since" the time of readjustment, but concluded that the readjusted lease incorporates the amended regulations. The better approach, on remand, is to amend section 11 of the readjusted lease to conform to the change in the regulations. 4/ Mid-Continent Coal & Coke Co., supra.

Appellant objects to section 12(b) of the readjusted lease which provides in part that the lessee shall conduct operations in a manner to avoid, minimize, or repair damage to "any forage and timber growth on * * * non-Federal lands in the vicinity of the leased lands." In its November 1982 decision, BLM sustained this objection noting that the Board in Blackhawk Coal Co., supra, had held such a provision to be improper. Accordingly, on remand, BLM should strike the portion of section 12(b) of the readjusted lease which pertains to the protection of "non-Federal lands."

Appellant next turns to section 13 of the readjusted lease which provides for the protection of cultural resources prior to and during lease operations. Appellant asserts the section fails to recognize that mining plans have already been approved, is in conflict with similar special stipulations and is not consistent with the Board's observations in Blackhawk Coal Co., supra. As we noted in Blackhawk Coal Co., supra at 103, section 13 is applicable not only prior to approval of a mining plan, but during the "continuation of lease operations." However, we also noted in Blackhawk that section 13(b) is in conflict with special stipulation 5(c) included in section 31 of the readjusted lease. Section 13(b) provides that "during lease operations" the cost of measures to protect cultural resources shall be borne by the lessor. Special stipulation 5(c) provides that the cost of measures to protect cultural resources shall be borne by the lessee. However, special stipulation 5(c) seems to apply prior to surface disturbing activities on the leased land, i.e., prior to lease operations. Thus, it appears to be consistent with section 13(a) of the readjusted lease. However, special stipulation 5(d) further compounds the problem by carving out an exception to the rule that the cost of measures to protect cultural resources during lease operations is borne by the lessor. That stipulation states that the cost of "data recovery," presumably the evaluation of cultural resources discovered during

4/ In particular, we note that section 11 of the readjusted lease "automatically" designates the lease as an LMU. However, 43 CFR 3475.6 (47 FR 33151 (July 30, 1982)), provides that the holder of a lease readjusted between May 7, 1976, and Aug. 30, 1982, may request removal of this provision. Appellant will have this option on remand.

lease operations, "shall be borne by the surface managing agency unless otherwise specified by the Authorized Officer, Surface Management Agency." (Emphasis added.) Section 13 and special stipulations 5 (cultural resources) and 6 (paleontological resources) are at best duplicative, as we noted in Blackhawk, and at worst in apparent conflict. Moreover, the November 1982 BLM decision, at page 4, indicates that section 13 has not been included as a standard stipulation in Federal coal leases since December 1980 and that the special stipulation is "better applicable in this situation." See Memorandum from Chief, Branch of Lands, Minerals and Recreation, BLM, to Chief, Branch of Lands and Minerals Operations, BLM, dated Sept. 3, 1982, at 2. On remand, BLM should develop a single, clear stipulation or set of stipulations with respect to cultural resources.

Appellant questions changes in section 14(a) of the readjusted lease which provides that the lessor reserves the right to authorize other uses of the leased land subject only to the requirement that such uses "do not unreasonably interfere with the exploration and mining operations of the lessee." In addition, section 14(a) states that the lessee "shall make all reasonable efforts to avoid interference with such authorized uses." Appellant contends that section 14(a) is an "unsanctioned" abrogation of its prior contractual "rights" and that the standard of performance imposed on it is "unwarranted." In its November 1982 decision, BLM found section 14(a) to be in accordance with section 29 of the Mineral Leasing Act, 30 U.S.C. § 186 (1982), authorizing the issuance of leases, easements, or rights-of-way with respect to lands under coal lease, and section 102(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701(a) (1982), providing for the management of public lands "on the basis of multiple use." We note that appellant's prior contractual "rights" with respect to the authorization of other uses were derived from section 29 of the Mineral Leasing Act, supra. However, to the extent that section 14(a) of the readjusted lease would permit uses other than those previously sanctioned, we conclude that it is fully consonant with the multiple use provision of FLPMA. See also Mid-Continent Coal & Coke Co., supra at 186-87. Moreover, we conclude that the standard of performance imposed on appellant is properly suited to the protection of other uses of the leased land and does not derogate appellant's right to conduct exploration and mining operations because only those other uses which do not unreasonably interfere with appellant's operations will be authorized. Accordingly, we conclude that BLM properly imposed section 14(a) of the readjusted lease.

Appellant questions next sections 17 and 18 of the readjusted lease which apply to employment practices, monopoly, and fair practices. Appellant asserts that sections 17 and 18 which are taken from section 30 of the Mineral Leasing Act, as amended, 30 U.S.C. § 187 (1982), fail to include statutory language that "[n]one" of the statutory provisions "shall be in conflict with the laws of the State in which the leased property is situated." We conclude that to include this language in the lease is unnecessary where the readjusted lease is subject to the statute.

Appellant then objects to section 23 of the readjusted lease which, in part, provides for the next readjustment of the lease after a 10-year period, i.e., "on March 1, 1992." This provision is mandated by section 6 of FCLAA, supra, and 43 CFR 3451.1(a)(1), and cannot be waived by the Board. Coastal States Energy Co., supra at 394.

Appellant objects to section 26 of the readjusted lease which provides for the liability of the lessee. Appellant asserts that this lease term provides for "no fault" liability. BLM contends such a result is not intended.

Section 26 of the lease provides:

(a) The lessee shall be liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease, except where damage is caused by employees of the United States acting within the scope of their authority.

(b) The lessee shall indemnify and hold harmless the United States from any and all claims arising from or connected with the lessee's activities and operations under this lease.

(c) In any case where liability without fault is imposed on the lessee pursuant to this section, and the damages involved were caused by the action of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damages occurred. [Emphasis added.]

In Coastal States Energy Co., supra, the Board rejected appellant's contention that this provision imposed liability without fault because BLM's response expressly disclaimed this was the intention of the language. However, the Board cannot ignore the obvious dichotomy between BLM's declared intention and the specific language used. Since this case is being remanded for other adjustments, the Board finds it appropriate to require BLM to revise section 26 to comport with the intention stated.

Appellant next objects to the special stipulations included in section 31 of the readjusted lease. Appellant argues that these stipulations fail to take into account the fact that coal lease UT-020305 is a "producing lease" and that, where requirements apply prior to the undertaking of lease operations, appellant would be in violation merely upon acceptance of the lease. In its November 1982 decision, BLM stated that the stipulations, taken from an environmental assessment (EA) of the proposed readjustment of coal lease UT-020305, prepared by the Forest Service, U.S. Department of Agriculture, "took into account that the lease is currently under production." See EA at 5-7 (Jan. 27, 1982). However, certain stipulations themselves are not phrased in such a way as to clearly take this fact into account. Stipulation 2 states that mining operations are to conform to the requirements of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977). We can read this stipulation to mean that appellant's mining operations may not continue unless they comply. See Gulf Oil Corp., 73 IBLA 328, 332-33 (1983), appeal filed, Gulf Oil Corp. v. Clark, Civ. No. 84-0157-C (D. N.M. Feb. 7, 1984). Similarly, stipulations 5 and 6 may be read to require a halt to mining operations until there is compliance with any required inventory of cultural or paleontological resources. Stipulations 8, 10, 11, 12, and 14 probably fall into this category. However, stipulation 7, which requires an inventory of certain animal and plant species "prior to entry upon the lease," may, indeed, be violated merely by acceptance. To the extent that stipulation 14 requires prior approval of measures for the protection of escarpments set out in a mining plan, this

stipulation probably falls into the latter category. We conclude that section 31 of the readjusted lease must be amended, on remand, in order to clarify the extent to which appellant's existing mining operations are affected by the special stipulations and to ensure that mere acceptance of the lease does not constitute a violation thereof.

Appellant argues that the special stipulations are duplicative of other terms and conditions of the readjusted lease and the approved mining plans. Appellant also argues that the special stipulations "conflict with the approved mining plans." Appellant has provided no evidence to support these contentions.

Stipulation 3 provides that coal may be extracted "only by underground mining methods." Appellant contends that BLM should also permit strip or auger mining. We note that paragraph 12 of the stipulation attached to appellant's original lease stated that the lease "does not authorize prospecting or removal of any mineral deposits by stripping, rim cutting, open pit, or any other method involving the use of mechanical earthmoving equipment without the prior written approval of the Forest Service." Additionally, the EA provides adequate support for the current decision to limit mining under the readjusted lease to underground methods.

[3] Finally, appellant objects to section 6 of the readjusted lease which provides for a production royalty of 12-1/2 percent of the value of coal produced by strip or auger mining methods and 8 percent of the value of coal produced by underground methods. Appellant does not dispute the 12-1/2 percent rate, which is set by section 6 of FCLAA, *supra*. See 30 U.S.C. § 207(a) (1982). However, the statute further provides that "the Secretary may determine a lesser amount [less than 12-1/2 percent] in the case of coal recovered by underground mining operations." 30 U.S.C. § 207(a) (1982). The applicable regulation, 43 CFR 3473.3-2(a)(3), provides that: "A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the Minerals Management Service may determine a lesser amount, but in no case less than 5 percent if conditions warrant." Appellant argues that the readjusted royalty rate must be 5 percent or that, in the alternative, BLM failed to consider setting the readjusted royalty rate less than 8 percent, but not less than 5 percent. Appellant states that the "conditions" which warrant a rate less than 8 percent include "adverse geologic circumstances" and "attendant higher production costs," the marginal return on investment "at present royalty rates" (\$0.15 per ton), the market price and anticipated foreign exportation. Appellant notes that pursuant to 43 CFR 3473.3-2(d) the Secretary may at any time reduce royalty to not less than zero percent, but argues that it is not equivalent to setting the royalty rate at the time of readjustment.

In Coastal States, we concluded that BLM properly set the royalty rate for coal mined by underground methods at 8 percent at the time of readjustment, even though the regulations permit a rate as low as 5 percent, citing Blackhawk Coal Co., *supra*. As we noted in National King Coal Co., 76 IBLA 124, 127 (1983), it has been the policy of MMS "not [to] consider reduction of the royalty rate for underground coal from 8 percent to not less than 5 percent at the time of readjustment of a coal lease." The rationale for this policy was essentially set forth in Blackhawk Coal Co., *supra* at 99:

If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of the lease, provides appellant some relief from [the] statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed.

As in National King Coal Co., *supra*, appellant has not persuaded us to depart from this policy. ^{5/} Accordingly, we conclude that BLM properly imposed a production royalty of 8 percent for coal mined by underground methods.

Appellant has provided no other evidence that the terms, conditions and special stipulations of its readjusted lease are not in conformance with FCLAA or its implementing regulations or that they are arbitrary and capricious or constitute an abuse of discretion. Appellant has demonstrated no other error by BLM in the readjustment of coal lease UT-020305.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and the case is remanded to BLM for further action consistent herewith.

Franklin Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

^{5/} Appellant also objects to section 6 of the readjusted lease because it requires payment of royalties on a monthly basis, as opposed to the prior quarterly basis, and calculates the value of coal for royalty purposes when mined, rather than when sold. The November 1982 BLM decision did not address these issues. We note that section 6 provides that royalties "shall be payable the final day of the month succeeding the calendar month in which the coal is mined." Thus, appellant would seem to be required to pay royalties whether or not the coal has been sold, the month after it was mined. However, for royalty purposes, the value of coal "shall be the gross value at the point of sale." See 30 CFR 211.63(f) (47 FR 33193 (July 30, 1982)). On remand, BLM should reconcile this apparent inconsistency, and clarify whether payments are to be made monthly.

